Mortgage, No. II.

Estates in Joint-Tenancy &c.

Note - Cont.d from end of p.d

Of Mortgages by Husband and Wife of her freehold, and his interest in Mortgage-money due to her.

But equity will interfere against the wife in favour of a specific assignee of husband (for valuable consideration) of wife's mortgage. - He gives credit to the property not to the person, and so has a higher claim, in equity, than assignees, under commission of bankruptcy. husband's.
(Pow. 360-5. 2. Vern. 270.) - and a higher equity - against the wife - than the wife.

So, an agreement by Husband to assign wife's mortgage, as security for a debt, with a delivery of the deeds, will bind the wife, in equity, pro tanto; i.e. to the amount of the debt, to be secured.
(Pow. 364-6 2. atk. 207. 2. V. 364-

Out of what fund, mortgages are to be redeemed —

General rule in equity, that, on ye death of a debtor, the fund, which has been increased by contracting the debt should be charged, in the first instance, with the payment.

Ergo on mortgagor's death his personal property is to be first applied to the discharge of the mortgage. The executor then, if he has assets is compellable to advance the redemption-money for benefit of the heir. Secus if

B.St. 35. C.a. — mortgagor shows a contrary intention.

(Pow. 368.9 & 410. 416. Salk. 449. Eq. C.a. 269. Talb. 54. Harr. 512. 6. Br. P.C. 526. 3. P. W. 358. Pr. Ch. 61 —

And though the heir is suable on the bond; yet he may compel the executor, (he having assets), to satisfy the debt.

(Pow. 369. auth. supra.

~~1 ye propy mortg~~ — Same rules in favour of the devisee of the equity of redemption — ~~Atty~~ Hares factus. —

(Pow. 370. Pr. Ch. 147. 1. Atk. 487.

Out of what fund Mortgages 95.
are to be redeemed.

7 If then, the mortgagor bequeaths his personal estate, among his relations; still it must be applied, in ye forgoing ca., to discharge of the mortgage.+ For ye Mortgagee's claim is a debt, and the personal fund of mor is first liable for debts." (Pow. 374. Pr. Ch. 61. 477. Talb. 54. 2. Vern. 701.

+ But never to ye prejudice of creditors - even by simp. Cont. (Pow 385-6. 1 P. W. 593. Talb. 53.

post 96. Qu. Does the rule extend to any other than residuary legatees? Pow. 385-6. (post, 96.)
It seems not.

ante, 94. Secus if testator directs otherwise, as if he by will exempts his personal fund. Pow. 374. 1 Ves. 57.

- And though the real estate of mortgor is charged by him, with payment of debts, yet this renders it liable only for the deficiency of the personal. (But if the real estate is devised "to be sold" for the payment of debts the personal fund is not applied in ease of the real.+) (Pow. 375-6. 1 Ves 57. 1 Ves. 213. 2. Vern 418. 1 E. C. a. 271 n. Pr. Ch. 451.)

+ Here ye testator's intention to subject ye real est., in ye first instance, is apparent.

S. Mortgagor devises his real estate, which includes his equity of redemption to A. and his personal estate to B. and charges both with his debts. The personal is first applied to all debts - Secus, if the equity

96

Out of what funds Mortgages are to be redeemed

& redemption were devised "to be sold" to pay the Mortgage.-

And the Heir, that the personal estate shall be applied, to disincumber the real estate, is never allowed to operate in favour of the heir, to the injustice of ~~simple contract~~ creditors & general legatees. (Pw. 385-6) Though it holds (~~in favour of the heir~~), as against Executors and residuary legatees. (General legatees given to be contradistinguished from residuary)

And if the specialty creditors resort to the personal fund, and exhaust it, the simple contract creditors, and general legatees, may resort, in equity, to the real estate, pro tanto. (Pw. 374-8. 385. Talb. Eq. 1. 2 Vern. 693. 2 Ch. Ca. 45-)

So, that simple contract creditors and general legatees are preferred to the Heir.

Out of what fund, Mortgages, are to be redeemed –

(1)

Same rule holds in favour of simple-contract creditors and general legatees, against Mortgagor's devisee; i.e. residuary devisee semb. infra – Pow. 378. Talb. 53.

It holds, in all cases, in favour of the creditors; and in favour of general legatees also, unless the devise is specific. – [If then the specific is [illegible]] they may resort to the real estate, pro tanto, ut infra –

But if one devises his real estate (or an equity of redemption) specifically and dies, leaving debts and legacies, and the specialty creditors exhaust the personal fund, the general legatees cannot come upon the devisee, pro tanto – For the devise is specific; and a general legatee never takes from a specific one. A "specific devise" seems contradistinguished from a residuary – Pow. 377, 378 – 1 P. W. 678. 1 Bl. 113. "All my real estate", specific: "the rest of my real estate", residuary. Pow. 382, 384. 319.

Out of what fund Mortgages are to be redeemed.

Where the descent is broken, and the heir at law of Mortgagor made to take by purchase, under a devise: he, if the devise is specific, will fall within the last rule. He is then specific devisee. Eg. A mortgagor, tenant in fee, devises to his eldest son in tail. (Pow. 385. Sel. 416. 1 P. W. 201. 681.

On the other hand, the heir of Mortgagor is not entitled to the aid of his personal property specifically bequeathed. (Pow. 386. 1 P. W. 693) Even in intention is to contrary

Money may be the subject of a specific bequest. But it must be so circumstanced that it may be identified, i.e. distinguished from all other monies of the testator. Eg. "100 £ due upon J. S.'s bond." (Pow. 387. 1. Eq. Ca. Ab. 298. 1 P. W. 127.

Thus, if Mortgagor devise the equity of redemption to A. and "100 £ in a bag", or a certain lease to B; A is not entitled to B's legacy to disencumber the estate. — The intention of testa. governs in these distinctions.

Cases of what Funds Mortgages are to be redeemed

(H)

But to render a bequest of personal estate specific it must be clear, certain and duly defined. "£5", without more, is general. (Pow. 388. 391. 1 P.W. 529. 2. Ves. 422.
But £1000 in such a box - or, due on such a bond, is specific.

ante, 64.

Though mortgagor devises his estate "with the encumbrances thereupon", yet if there are no other words shewing an intention that devisee should take cum onere; the personal fund is first to be applied, according to the above distinctions, to disencumber it. (Pow. 399-2. 2. P.W. 386. 1. Ves. Sr. 352 461.
- No manifest intention, yt devisee shall bear mortgage the words "at yt incumbrances" &c are only descriptive of yt subject

- so if there appears, on the face of Mortgagor's will, a clear positive intention that devisee should hold the estate disencumbered; even the real estate, in the hands of the heir shall be applied to disencumber it.
Mortg. devises an estate in fee and an estate for 3 lives to A. (this being all his landed interest) then purchases the reversion of the latter which is a provision as to that. Here clear intent to enfranchise the heir. (Pow. 393-2. 398. 403 405. 2. Atk. 624

100.

Dent of what fund Mortgages are to be redeemed—

But if Mortgagee sells, or assigns, his interest; the heir of the assignee has no claim (on assignee's death), to her personal assets to discharge the land. For the personal estate of assignee is not increased ~~if not increased~~, but diminished by the purchase. (Pow. 410. 1 Bro. Ch. 101. Same rule as to assignee's devisee— 1 & 1 Br. Ch. 454 - Pow. 412.

and p. 4.

If the money due on Mortgage is not properly the debt of the owner of the equity of redemption, the estate mortgaged itself shall on his death, bear the burden. His personal assets not liable. For his personal estate, has not been benefitted— If Mortgagor's heir (pledges his own land as additional security, and then) devises the land to X— the devisee shall not have the aid of the personal fund.— (Pow. 413. 416 - 1 Bro Ch. 454. 58. 1 P. W. 347. For y^e heir's personal property has not been increased by y^e Court

Of the Interest of money secured by Mortgage. (Vid. Tit. Usury.

Lawful interest in England, under the Statute 12. Ann. is 5. pr. Cent. (Pow. 421.

In Connecticut is 6. pr. Cent. (St. Cont. 431.) so, throughout N. England — in N. Y. seven.

General rule, that reserving more, makes contract void — receiving more incurs the penalty — 2. Mod. 307. 4. Burr. 2253. Dougl. 223. 2 T.R. 241. 3 Id. 539. 7 Id. 184.

As ye reservn. of illegal int. avoids ye contt. for re-paymt. of ye loan; so it makes void a mortge. given to secure it.

Said by Lord Hardwicke, that if Mortgage is drawn for 5. per cent, and Mortgagee receives 6., the Mortgage is void. (Pow. 421. 3. Atk. 154) This must mean a receiving in pursuance of a private original agreement — or, a receiving at the time of the loan, amounting to an illegal reservation

Also, holden by Lord Hardwicke that a contract, made in England, for a mortgage of lands in the West-Indies, is usurious, if more than 5. per cent is reserved (Pow. 421. 3 Atk. 727. 1 Wo. 428) — Though the rate of interest is higher there. (The paymt. in this case is to be in England I conclude. & see Ard. 34) — (3 T.R. 425, under Stat. 14 Geo. 3

Of the Interest of money secured by Mortgage

(4)

Distinction in Chancery, between an agreement to pay 4. p. cent with a clause of increase to 5 if the debt is not punctually paid, and an agreement to pay 5. with a clause of reduction. Latter enforced; former not. Penalty not enforced in equity. (Eq. Ca. Ab. 623. Pr. Ch. 160. Barnard. 481. 3. Atk. 520. 2. Vern. 316. 289. 3. Ch. R. 432.): A distinction of no practical use, if the parties choose to make it as they always may, by the form of the contr.

Usury, 5. 106 — But if, after int. has accrued, a covenant or agreement to pay the additional one per cent in the case, is good in equity. (Prec. 424. 2. Vern. 134. Eq. Ca. Ab. 449. Pr. Ch. 161. Ch. R. 437.) Being considered then as a liquid. covenant, + or compensation; not as a penalty. 1 Pr. Ch. 161. n.

So an agreement (ut supra) to raise the interest from 4. to 5. on non-payment, will be good in Chancery, if, in consideration thereof, any indulgence, by way of forbearance, be actually given ~~by Mortgagee~~ to Mortgagor. It is not a penalty in this case, but a liqui-

Of the interest of money secured by Mortgage

Liquidated satisfaction. Q. Where on non payment, mortgagee sent the account to Mortgagor who admitted it, and desired forbearance which was granted, on Mortgagor's agreement to pay the addition. (Pow. 424–5. 3. Br. P. C. 68. 1. P. W. 652.

Interest upon interest arrear is regularly not allowed. (Pow. 429. 442. Pr. Ch. 116. 2. Atk. 331. 1. P. W. 652 – note sa.)

But if mortgagee assigns with the concurrence of Mortgagor, all the money paid by the assignee, and which was due to Mortgagee, (i.e. both prin. & interest) will be considered as principal, and draw interest. The interest on the original interest is allowed. (Pow. 426. 2. Ch. C. C. 68. 1. Vern. 169. 2. Ves. 35.

In nature of a contract between Mortgagor and assignee, that the latter should pay his debt; and in y^e mean time assignee actually turns int^t. in y^e orig. int^t., or does what is equivalent – parts w^t. his own money in paying y^e int^t. due, as well as y^e principal)

Otherwise y^e assignm^t. is without mor's concurrence. (Pow. 427. 3. Atk. 271. Vern. 158. 3 Rep. Ch. 78. It w^d. be allowing mee, alone, to convert int^t. into principal

Of the interest of money secured by Mortgage

(4)

~~Secus~~ So if (assignee has not paid the money aw'd) the assignment is only allowable, to load the mortgagor with compound interest. (Pow. 426. 1. Eq. Ca. 329. — & even tho' mor assented to yr. assignmt. The transf. being fraudulent, upon him

post 117.

The account between mortgagee and assignee, as to the amount of the debt, is not conclusive on mortgagor. He is no party to it. (Pow. 426. 1 Vern. 168.

But an assignment by mortgagee, to entitle his assignee to interest on interest, ~~should~~ must be with the concurrence of mortgagor. Secus, he takes on the same terms with mortgagee.
Pow. 427. 3. Atk. 27. 3. Rep. Ch. 78. 1 Vern. 168

Once held, that mortgagee, (the mortgage being forfeited), should have interest on interest. Pow. 428. 2 Vern 135. 1 Eq. Ca. 258
This rule was soon exploded.
Pow. 429. Pr. Ch. 162. 2. Atk. 331. 1 P. W. 652.—(3. 103)

Of the Interest of money secured by Mortgage

The report of a master in Chancery, computing interest makes that interest principal, from the time of the reports being confirmed. It is as a judgment of Court.+ (Pow. 430. 1. P.W. 478. Pr. Ch. 500. 2. Eq. C. A. 530. 9. 1. P.W. 453. 480. 376. 1. Bro. P.C. 202. 566. - 3. Atk. 732. — see Usury, 5.

+ wh. consolidates ye prin. & int. into one aggregate debt.

But a master's account against an infant on a bill to foreclose does not regularly carry interest on interest. For one reason for allowing interest on interest, in common cases of this kind, is, that mortgagor is guilty of neglect; which is not imputable to an infant. Pow 432-3. 2 Vern 392. Litt. § 402. 2 Rayl. 25. 2. Br. P.C. 56. 12 Vin. 113.

But if the infant is plaintiff in Chancery, on a bill to redeem; the account, taken by the master, carries interest on interest. Defendant in Chancery, ~~in such case~~, is allowed the full benefit of proceedings into which he is forced by the infant. (Pow. 434-5. 4. Br. P.C. 447.

Of the Interest of money secured by Mortgage—

So, if an infant, ^(entitled to an equity of redemption) agrees to pay interest on interest, and thus procures a benefit; it is allowed against him.
(1 Pow. 437–8. 3 P. W. 315.– 1 Eq. Ca. Ab. 287.)

But, mortgagor's merely signing an account, which admits, that so much is due, as interest, does not turn it into principal.– Does not amount to an agreement for that purpose.
(Pow. 439. 1 Vern. 652.)

So, an agreement at the time of the mortgage to turn interest in arrear into principal (i.e.) to pay compound interest; is not binding;– Oppressive.– But after interest has become due such an agreement ~~[illegible]~~, is good.
102. (1 Pow. 441–2 Salk. 449. 2 Atk. 331.) (See Usury,

Of the Interest of money secured by Mortgage.

ante, 26. If mortgagee in possession has expended money in defence of Mortgagor's title when impeached, he may add it to the principal and it will draw interest. –
(Pow. 442. 3 Atk. 518.

ante, 34. 35. ~~post, 125~~ Tenant for life of the equity of redemption controllable by the remainder-man to keep down the interest during his estate. And by purchasing the mortgage, the latter may compel tenant for life to redeem, by paying ⅓ of the debt or quit possession. –
(Pow. 131. 440. 1 Bl. C. 239. Gilb. Rep. 22. 63.
2. Eq. Ca. 246.

But tenant in tail in possession of land
ante, 35. mortgaged is not controllable by remainder-man, or reversioner, or issue in tail, to keep down the interest. (~~He are his representatives after his death~~). For they are all in the power of tenant in tail, [may be removed by fine or recovery] – ~~[illegible]~~ – Pow. 443. & 445. 1 Ves. 44. 480.
\+ Same rule, in favr. of ye. issue in tail, agt. rem. man, & revr. – & for same reason. 3. P. Wms. 235.
post, 125. – Besides his estate may last forever.+
Pow. 444.

Of the Interest of Money secured by Mortgage

But if tenant in tail of mortgaged lands is an infant and his guardian in possession, he is compellable to keep down the interest. For an infant cannot bar the remainders by fine & except under the Kings privy seal which will not be granted for such a purpose. (Cow. 444. Sal. 567. 2. Atk. 427. 1. Ves. 477. 480.

If tenant in tail does keep down the interest, remainder-man shall have the benefit &c. (i.e.) is not compellable to re-imburse the tenant in tail or his representative.– (Cow. 445. 1 Ves. 477. 1. Br. Ch. 218.

For ye remr. man's int. is deemed so remote, quoad ye probability of enjoyment, yt it is deemed of very little, or no, value, & ought not to be compelled to contribute, when ye probability is, yt he will never be actually benefited.

post, 115. bis. If first mortgagee takes possn. and afterwards permits mortgagor to take the profits, without paying the interest, still, in favour of second mortgagee the profits shall be applied to first mortgagee's interest. So yt the first mortgagee's interest shall not keep out second mortgagee any

+ by y^e profits | any longer than if the interest had been duly paid,+ Semb. the secured would suffer. — (Pow. 453. 468. Cr. Ch. 30. 1. Vern. 270. 2. Vac. 658) — For he is prevented, from availing himself of y^e profits, by first mortgagee.

ante, 24.

~~+ For y^e bond carries y^e debt~~

+ For he has y^e control of y^e debt [so y^t he may extinguish it, by giving up y^e bond & mor.] #

This he may receive, because he can command y^e poss.^n, & take y^e profits — wh are a set-off to int.^t, pro tanto.

Where a bond is given, by mor, to mortgagee, ~~the~~ any holder of it, being fairly possessed of it, has of course a right to receive the whole principal and interest.+ (~~for giving up the (to mor) will the bond extinguishes the debt~~). But the holder of the mortgage deed, has not, by the possession of it, authority to receive more than the interest.# [~~Because~~ [But his receiving of the deed, to mor wd not revest the title Breach of trust]]. For the debt is the principal. — (Pow. 1534. Sel. 158. 1. Vern. 150. Cr. Ch. 290. 1. Eq. Ca. Ab. 45.) [~~Ex. the ... deed ... in ... ; paid up, by pawnee, to mor.~~]

Ex. pawnee of y^e bond. For y^e debt is pledged to him. Of course, he has a right to receive it — tho' liable to acc.^t for it

Assump.^t 80.

If mortgagee refuses to receive his money ~~...~~ after forfeiture, on tender made, he loses ~~his~~ interest, on the debt from the tender. (Pow. 554. 1. Eq. C. A. 318. 9.)

— Provided mortgagor gives notice of his intention to pay 6 calendar months before hand, and tenders the money on the very day, which he appoints.* ~~...~~ Otherwise the interest will be allowed. — (Pow 454-5. 1. Eq. C. A. 318. 319.

* This notice is req.^d, because y^e day of paym.^t is past.

Such tender will also bar mortgagee

Of the Interest of money, secured by Mortgage

Executor, or Devisee, of interest.
Idem.

But in these cases the Mortgagor must make oath that the money has been always ready for Mortgagee since the tender,# and no profit made of it. Semb. the interest will run on: [struck through] And his oath may be contradicted. Cow. 455. 1 Ch. Ca. 246. 2 Ch. 378.

\# in analogy to ye rule of ye Com. law.

See Tender.

And in general, there must be a strict legal tender, to stop the interest. Cow. 455. 2 Ves. 373. 678. 3 Atk. 93. 2 Eq. Ca. Ab. 605. 34.

But tender of a bank-note has been holden good where mortgagee made no objection to the legality of the tender and mortgagor offered to exchange it for money, if mortgagee wished it. Cow. 456. 1 Eq. Ca. Ab. 316. 9. 318. 3. Bac. 659. 1 Ves. 339. 2 Sed quaere. #

3 T. R. 554. 1 Bur. 452. 5 Bac. 6. Chit. on Bills 172. Doug. 5. 2. 3. 2 Bos. & P. 528.
\# Tender in bank notes is now held good, unless objected to, as not being money.

Of the Interest of money secured by Mortgage —

vid. Usury.

The money (being a sum in gross) is regularly to be tendered to the person of Mortgagee, if no place is appointed in the contract. Tendering upon the land, (mortgaged above) is not sufficient (Pow. 103. Bac. Abr. 2 ... [illegible] 6) Not like paying rent on ye land.

But if the time and place of payment are appointed by the parties, tender must be at that time and place. (Pow. 106. Co. Litt. 210. ... 5 Bac. Tender.)

So if no place is appointed in the condition, and mortgagor gives notice where he will pay, tender at that place is good, if the appointment is a reasonable one, and no objection made to it by Mortgagee when the notice is given. Pow. 457. ... [illegible]

Of the Interest of money secured by Mortgage.

(4)

And in some cases, tender at Mortgagee's house, in his absence, will be sufficient, where no place is expressly appointed. Q. If mortgagee wilfully keeps out of the way.—(Assumpt.—5.5. Pow. 107. 1. Ch. 2.29.

But if mortgagee has doubts as to any legal question arising out of the transaction, he ought to have time to consult counsel, before the interest shall stop, on tender made.—
Q. Mortgagor presents a deed of reconveyance to be signed by Mortgagee, and containing covenants, (Pow. 108. 459. 2. 2. Wil. 10. 2. Eq. C. 2. 603.

So if there is a question as to whom the equity of redemption belongs. The Reconveyance ought to be made till that point is settled. (Pow. 459. 2 Eq. Ca. Ab. 533. 34.

Of the Interest of money secured by Mortgage —

The interest reserved upon a Mortgage may be altered by a parol agreement subsequent. F. Reduced from 6. to 5. — Qu. In the case decided, the Mortgagee was plaintiff; — it was rebutting an equity. — Would such agreement be enforced in favour of mortgagor, when pl.ff.? Pow. 151 — 2. 6. Bro. P. C. 580.

And w.d not such an agt. to increase the int. be ~~enforced~~ good ag.t him, when pl.ff. — (Powys of Chy, p.

Of the method of Accounting.—

The mortgage being a pledge not an alienation, mortgagee has no right to the rents &c till he takes possession.— Mortgagor therefore not bound to account for the profits during his own possession. He is to pay interest—(Pow. 8[illegible]. [illegible]64. 3. Atk. 244. 2. H. 101. Doug. 356.

ante, 15.

But mortgagee must account for the profits during his possession;— [illegible] they are to be applied to the discharge of the debt.—(Pow. 464 &c 2. Atk. 534. 1. Vern. 476.
— In nature of a bailiff to mortgagor quoad y^e profits.

If mortgagee in possession manages the estate himself, he has no allowance for his care and trouble.+ Same rule though there is an agreement to the contrary.—(Pow. 466. 2 Atk. 120.) Oppressive.
Secus, if he employs a skilful bailiff.— (Pow. 4[illegible]6. 1 Vern. 316— 3. Atk. 518

+ i.e. (I suppose) he has no salary, or commission: But his time & labour are to be taken into y^e acc^t. I trust, for y^e purpose of ascertaining y^e net profits of y^e est^e.

If mortgagee in possession assign to an insolvent person, without Mortgagor's consent, & mortgagee is still answerable for the profits, before and after assignment, as before.
(Cas. t. H. 1. Eq. Ca. 328. 2 Ch. Ca. 3. 3 Rac. 658.

Mortgagee is to account with mortgagor only for the actual profits received; not as the case may be for the actual annual value of the land), unless it appears that he might have made more, but for fraud or wilful default: & if he had refused a reasonable tenant, who would have given more &c. (Cas. t. H. 1. Rep. 45. 4. 6. Ch. Ca. 1. Eq. Ca. 328. 3 Rac. 654.

If the mortgagee proves, that mortgagee let the land at a certain price, for a certain time; that will be considered as the value during the whole time, unless mortgagee proves the contrary.
(Cas. t. H. Ch. Ca. 6.

Of the method of accounting

ante, 108. But if mortgagee takes possession and keeps other creditors out, he will be charged in their favour with all the profit, which he might + have received after his entry.

+ wt. proper care,

(1 Pow. 948. Infra 240. Pr. Ch. 30. 3 Bac. 658.

— Q. Having taken possession, he permits Mortgager to take all the profits.

Still he is not bound to account even with subsequent mortgagees where he permits mortgager to take the profits for any profits accrued before he has notice of the subsequent incumbrance.

2 Pow. 968-9. 2 Rep. Ch. 209.

— in no fault till then

ante, p. 108. If mortgagee permits mortgagor in possession to make use of his incumbrance (his title-deeds) to keep out other creditors, he will be charged with the profits in their favour from the time at which they might have had possession but for his interference.

Q. Mortgagee permits mortgagor to

use

use his incumbrance against mortgagor's assignees; he being a bankrupt.— This is called Tacking. Cow. 455. 1 Vern. 267. 3. Bac. 658.

Though mortgagee, who has been in possn., has assigned, and a bill for redemption is brought against assignee; yet mortgagee must be made a party that he may account for what he has received.— Pow. 471. 1. Eq. Ca. a. 543.

If there are several mortgages, an account stated between first mortgagee and mortgagor, will be conclusive upon all the rest, unless fraud, or collusion, be proved.— (Pow. 472. 2. [illegible] 33. 3. Bac. 659. 1. [illegible] 12.) It is prima facie binding on ye latter. [illegible] taken under the authority of Court, as before a master.—

[illegible] 104. But the account between mortgagee, and assignee will not conclude the Mortgagor.— For the profits are his, he is the debtor, [illegible] he should be a party to the account.— Pow. 472. 1. [illegible] 68.

Of the method of accounting

An assignee, after several assignments, is not bound to account for the profits before his own time; and the former profits shall not be taken into the account against him. They shall be set off against the previous interest. (Cas. Ch. 1 Ch. C 118. 2 Ch. R. 330.) Reason: The difficulty of stating an acct. of all y^e profits, in such cas[e]

note, 41.

If mortgagor after having ineffectually tried to defeat mortgagee's title at law, exhibit a bill to redeem; all that mortgagee expended at law, in defending his title, shall be allowed him in the account.
Cas. t. Finch 403. 2 Vern. 536.

There are two modes of taking the account between Mortgagor and Mortgagee.
One is by making annual rests; (i.e.) by applying the annual surplus of the rents and profits, on the amount of the interest, to sink the principal.

The other mode is, by bringing all the profits into one aggregate sum, and all the interest into another.—

Where there is a surplus, of rents and profits the former mode is the more advantageous one to mortgagor;— as it lessens the amt. of accruing interest each year,—by annually reducing ye. sum, wh. draws int.

The rule is, that if the yearly rent, &c. greatly exceed the annual interest of the debt, annual rests are to be made; otherwise not:— (Pow. 474. 2. Ath. 534. (~~Ch 99. 91~~))
— Or at least master is not bound to apply every small excess to the principal.

Of Foreclosure

A. Chancery after forfeiture, will in favour of Mortgagor, decree a redemption; so in favour of Mortgagee the same Court will decree a foreclosure: i.e. will order that unless Mortgagor pay the debt within a limited time; he shall be forever foreclosed, or barred, of his ~~equity~~ right of redemption in eq.— which order is irrevocable, except under special circumstances.
Pow. 445 2 Atk. 198.

If the Mortgage is of a reversion, a decree may be had (in fav. of mtgee) for the sale of the estate, + to pay the debt. Pow. 475. 510.
+ (if not redeemed)
Because, in such a ca., mee cannot avail himself of any present profits of ye land. — Aliter, when an est. in poss. is mortgd.

(one mortg.)
If a mortgage is made to several creditors, all must be made parties in a bill for foreclosure. So, if a Mortgagee assigns to several, all the assignees must be made parties. (Pow. 476. 475. 1 Ch. Ca. 365.

Equity will never decree a foreclosure, till forfeiture of the Mortgage.
(Pow. 426. 31. 54. 137. 2 Vent. 365. 1 Vern. 23.)
ante, 21. 05. 78.
Till then, the equity of redemption, does not exist; ~~and~~ the ~~Mortgage~~ estate is redeemable at law.

Of Foreclosure

On bill for foreclosure, the title of Mortgagee cannot be "investigated." ~~This must be settled at law.~~ (Pow. 476. 2. Ch. C. 244)

i.e. Chancery, on such a bill, will not aid his legal title, but will leave it as it is ~~to be settled at law~~. The decree only destroys the equity of redemption. — If ye mortgage deed is defective, mee may compel mor to make it good, on a bill for yt purpose; but not on a bill for foreclosure.

Mortgagee may pursue all his remedies, at the same time; viz. Sue for the debt on ye bond &c; or the possession in ejectment; and for foreclosure by his bill in Chancery. (Pow. 477. 2. Atk. 344. Doug. 401.

ante, 30. 35. 39. And in Connecticut, after judgment on the bond, he may levy the execution on the land mortgaged — (~~Pl. 1002~~) & thus acquire ye absolute title. — But where mee is ye creditor, taking ye land in exn, ye land itself (as if disencumbered) — & not ye eqy of redn only — shd be appraised off to him. — Aliter, if any other creditor ~~so~~ levies exn upon it. For he takes it subjt to ye incumbrance.

R. in Massts, (ut audivi), yt mee cannot take ye eqy of redn, on exn; tho' any other creditor may do it. Qu. de reason.

Of Foreclosure

(V)

~~ante, 8.~~ But under special circumstances the Court will grant an injunction to stay proceedings on the ejectment. Cow. 477-8. 2. Atk. 344.

ante, 76. Chancery may refuse a decree for foreclosure where injustice would be the consequence of passing it. — Mortgagee, having notice of a prior voluntary family settlement procured the trustees to convey the legal estate to him, to protect his mortgage. Cow. 237. 478. 2 Vern. 271. Sal. 680. Left to his remedy at law. Unfairness — breach of trust in trustees.

Mortgagors praying "relief" against mortgagee, is equivalent to praying a redemption; for redemption is the proper relief. Cow. 479. 2. Atk. 234.

Of Foreclosure

~~Where~~ If, upon reference to a Master to take the account, on mortgagor's bill to redeem, he does not redeem, by paying the money according to the order; and the Court, on mortgagee's application, dismisses the bill on this account, this dismissal is equivalent to a decree of ~~for~~ foreclosure. (Pow. 4, 49. 2. Atk. 264.

ante, 23. 80. If mortgagee's heir brings a bill for foreclosure, it is good cause of demurrer, that mortgagee's executor is not a party; he being entitled to the money. (Pow. 477. 1 Ch. C. 57. So, if it appears on the hearing, that mortgagee's executor, or administrator, is not a party, the plaintiff, the mortgagee's heir, can not proceed though there is no demurrer. Pow. 477. 2. Ch. C. 29.

But mortgagor's executor, on a mortg. of ye fee, need not be made a party to the bill for foreclosure. He has not the equity of redemption; ~~[i.e.] in a mortgage of a [inheritance] (freehold)~~]. (Pow. 477. 380 3. P. W. 333. n

Of Foreclosure

agt. mortgor.

But if mortgagee's heir has obtained a foreclosure, it will be good, though the executor were insolvent: for the heir may retain the land, on paying the debt to the executor or administrator.

ante, 23.

Sco. 420. 2 Vern. 66. 1 Vern 314.

ante, 30.

But if the heir, having foreclosed, does not pay the mortgage money to the executor, ~~the heir~~ the executor may compel the heir to convey the land to him.

(Sw. 398. 480. 2 Vern 64 393. 3 Ch. ca. cited. 2 Ch. ca. 30. 1 Eq. Ca. Ab 328.

In a decree to foreclose within a certain number of months, the time is computed by Calendar months, not lunar.

(Sw. 487. 2 Eq. Ca. Ab. 605-36.

Of Foreclosure

A decree to foreclose tenant in tail of an equity of redemption, will bind the issue in tail and all those in remain over though they are not made parties. [~~& the "mortgage"~~] Pre. 48. 1. Ch. C. 217

–(The mortgagee thus acquires all the right of the tenant in tail, and the remainders were all in his power.

ante, 107.

But if there is tenant for life of an equity of redemption, with remainder over, the remainder man ought to be made a party to the bill for foreclosure.
(Pre. 483. 2. Atk. 101.

– He is not in the power of tenant for life. & has an immediate int. in y^e^ ~~suit~~ subj^t^ of y^e^ suit.

If there are several incumbrancers, some of whom are not made parties to the bill; still the plaintiff may foreclose such as are made parties.
(Pre. 483. 2. Vern. 578.

– Eq. Three mortgages. – First mortgagee makes only the third a party. He is bound by the decree.

But those who are not parties to the suit, are not bound by the decree.+
Pre. 192. 483. 3. Rep. Ch. 84. 2. Vern. 578. 663. &

+ & of course have still a right to redeem.

Of Foreclosure

ante, 55.

When all the mortgagee's interest in a mortgage is devised away the devisee may bring a bill to foreclose, without making mortgagee's heir or ex.^r a party. They have no interest. (Pow. 485. 1. Ch. Ca. 33. 1 Eq. C. a. 318. 5.

An infant may be foreclosed; but a day is given him to shew cause against the decree, when he comes of age; (i.e.) within 6 months afterward. (Pow. 485. 432. 2. Vern 392. 342. 479. 1. Vb. 295. Pre. Ch. 185. 2 Ves. 23.) Words of the decree: "This decree is "to be binding on the said A. B. "unless he shall, within 6 months "after of (being served with process "for the purpose), shew good cause "to the contrary." (3. Bro. 148. Pow. 485 — In Con.t there is no such proviso, in w.ch since the inf.t has his privilege without it.

If the infant shews no cause within the 6. months, the decree is made absolute upon him. But when he shews cause, he may, on motion, put in a new answer and make a new defence.
(Pow. 486. 3. Bac. 148. 2. Atk. 532. 1. P. W. 504. 2. Vid. 401. 3. Bro. P. C. 301.

The decree, [illegible] is to be [illegible] in the [illegible] [illegible] coming of age. It is a judicial writ, by way of [illegible] [illegible].
(3. Bac. 148. Pow. 486. 3 P. W. 3[illegible]7.

But when he comes, [illegible] he is not allowed to go into the account anew, of course; nor is he entitled to redeem of course, on payment. He can shew only that the decree is erroneous or unjust.—(Pow. 487. 3. P. W. 352.
—i.e. he may take advantage of any reasons, which existed at the time of the foreclosure and which, if they had then been urged, would have prevented the decree.—And in this way he may open the foreclosure.—(Pow. 489. & 490.

Of Foreclosure

But it is said that where an infant owns the equity of redemption the mortgagee's proper remedy is a decree, that the estate be sold for payment of the debt. This binds him without a day after age. For there is no forfeiture (decreed); the surplus being his. But even then if he is decreed to join in the conveyance, he must have a day. &c. (1 Pow. 487. 1 Vern. 295. 2 Ib. 429. 1 Eq. Ca. 184. 3 P.W. 504. 3 Vern. 427.

But if a feme sole, or her ancestor, mortgages land, and the equity of redemption being in her, during coverture; a decree to foreclose is peremptory. She has no day given her to shew cause against it, as an infant has. She is under no natural incapacity to act for herself, & has voluntarily alienated the rights of acting for her, to the husband. 1 Pow. 288. 291. 3 P.W. 352. 1 Ves. 305. 2 Atk. 412 — Hob. 95. 1 Ib. 438.

But though no day is given her by the terms of the decree; yet it seems that after enrollment, she may avoid the decree if there is just cause. (Pow. 491. 2 P.Wms. 400. 3 Atk. 238.) — as injustice or plain mistake.

When opened. If mortgagee is guilty of any unfair conduct in obtaining a foreclosure, the Court will open it; i.e. revive the right of redemption. — So if Mortgagee obtains a foreclosure, pending a suit by mortgagor's creditors to have the land sold for payment of debt. — Opened in their favor. (Pow. 2. 493. 1 Madd. 3 Ch. 65. 2 Atk. 544. 5 Ves. 476. 3 [illegible] 601.

So if mortgagee obtains foreclosure after judgment creditors of mortgagor have given notice of their demands, and tendered him payment. (Pow. 492. 2 Ch. C. 140.)
Decree if Mortgagee had no notice [illegible]
2 Ves. 601.

Of Foreclosure

Where a foreclosure is decreed in favour of a subsequent incumbrancer, the first mortgagee shall be allowed all his expenses in obtaining the foreclosure.
(Cas. Ch. 2 Vern. 185.
This rule does not hold, I think, if the foreclosure was obtained by unfair means.

Time enlarged. The time limited for payment, on a decree for foreclosure, may be enlarged upon special circumstances + q. d. the estate is of much greater value than the amount of the debt.
May be enlarged several times, the reasons continuing.
1 Eq. Ab. 313–4. Barnard. 221. 2 Eq. Ca. Ab. 39.

+ i.e. before ye foreclosure takes effect, ye time may be extended.

Where mortgagor was prevented from paying, by a rebellion, ye time was enlarged. (Eq. Ab. 194. 1 Ch. Ca. 1 Rep. Ch. 253.)

Of Foreclosure

Foreclosure not barred in favour of a mere volunteer, ex. gr. Devisee of yr. eqy of redn. For mortgagee has, at least, equal equity, and an absolute estate at law. (1 Cow. 194. 1 Bl. C. 217. Eq. C. A. 3[illegible].)

ante, 52. On Welsh mortgages there can be no foreclosure; no forfeiture. (Cox 105. 1 Ves. 406. [illegible] 2 Vern. [illegible].)

If first mortgagee, having obtained a decree of foreclosure against the second, devises the land to mortgagor, the foreclosure is ipso facto opened, in favour of the second, against mortgagor. The second mortgagee's claim on the land is thus revived: the 2nd mortgagee's decree is an estoppel to mortgagor;+ (Cox [illegible] 2 Vern 233. 1 Vern. 28. [illegible])

+ i.e. preventing him from availing himself of ye foreclosure.

The legal title is now vested in mor.; & agt. him, 2nd mee has a plain eqy to redeem his orig. lien, yr. debt being unpaid.

As between second mee, & mor, ye former has a plain equity, tho he had it not, agt. first mee.

The ca. seems to be ye same, in effect, as if there had been no prior mortge.

Of Foreclosure

ante, 77.

And if mortgagee after having obtained a decree to foreclose, sues on the counter-security (ex. his bond); this is a waiver of the foreclosure — Pow. 496. 1 Eq. Ca. Ab. 317.
vid. Pow. 505 &c. 2. Eq. P. C. 119.
For he cannot collect y^e^ debt, & still hold y^e^ pledge.
(~~Rule in Conn. y^t^ foreclosure is a satisfaction of y^e^ debt! et audivi, 1822.~~)

Since Decided in Connecticut that foreclosure with forfeiture, satisfies the debt. (Root 252) &c. Can this be law? — Since, holden contra. — Now (1822) again holden to be a satisfaction, et audivi. Quod mirum. 3 Conn. R. 62.

Foreclosures irregularly not opened when mortgagor has acquiesced, for several years in mortgagee's possession under it. ~~the foreclosure.~~
(Pow. 4.. 500. 5.. 501. &c. 2 Ch. C. ..11. [illegible] 21. [illegible] 2 Eq. P. C. 414 3 Ch. C. ...
This is on y^e^ prin. of quieting titles of long standing.

[illegible]

In England the practice is, ~~[illegible]~~ if mortgagor does not pay the debt at the time first limited + to make the decree absolute, by a further order. (Pow. 479. 602.

+ in y^e^ decree,

Of Foreclosure

In Connecticut the first decree becomes absolute of course if mortgagor fails to make payment on the day — The English practice would be inconvenient here: Chancery in England independent Court; not so in Con.

If tenant in tail of an equity of redemption, suffers a recovery pending a bill (barring the land), on a bill to foreclose, or compel a sale, the heir in tail shall not be affected, if the premises is sufficient to satisfy the debt. (1 Ves. 576. 1 Ves. 251)

Finis coronat opus

Of Estates in Severalty Joint Tenancy, Coparcenary and Common

Under former titles estates are considered with respect to quantity of interest in the owners and the time of their enjoyment; now to be treated of with respect to the No. & Connexions of their owners. 2. Bl. 179. 2. Mad. 112.

I. An estate holden in severalty is one of which there is only one owner, during the continuance of his interest. 2. Mad. 112. 2. Bl. 179.

All estates are supposed to be in severalty (when rules are laid down respecting them) unless they are declared to be otherwise. 2. Bl. 179. 2. Mad. 112. 113.

II. An estate in joint tenancy (in things real) is an estate in lands or tenements, granted to two or more; & it may be in fee simple, fee tail, for life, for years or at will. (2. Bl. 179. 2. Mad. 114. Litt. § 277. 2. Cru. 188.

Of an Estate in Joint Tenancy

1. As to its creation: It is always created by purchase: i.e. by act of the parties; never by descent, or act of law. (2 Bl. 180. 2 Cruise 12.) ~~[illegible]~~ It may be created, then, E.g. by deed, devise, fine or any other com. assurance. (2 Cruise 12.

Post. 21. 19. 22. If an estate is given to two or more, without words denoting an intention that it should not be a joint tenancy, it will be such. E.g. grant "to A. and B. and their heirs." They are joint tenants in fee. (2 Bl. 180)

Post. 22. But if land is granted to two & the heirs of the body of one of them, they are not joint tenants, but tenants in common. (2 Bl. 193. 2 Bl. 180.) ~~[illegible]~~ (Post.) For ye latter would lack unity of int.

2. As to its properties: These are derived from its unity, which is fourfold; unity of interest — title — time and possession: that is, joint tenants have one and the same interest, — accruing by one and the same conveyance, — commencing at one and the same time — and held by one and the same undivided possession.
(2 Bl. 180. 2 Cruise 128-9. [illegible] 311. 312.)

Of Estates in Joint tenancy

First, unity of interest: One, a man may have one Quantity of interest and the other another; as for life, and the one & so they are not Joint-tenants. So, if the Estate of one is in Possession, and that of the other in Expectancy. 2. Bl. 180-1. 2 Wood. 124. 1 Mod. 58. 192. Co. Lit. 188.

If a grant is to A. and B. for their lives, they are joint tenants of the freehold. And each has an estate in the whole for the life of his companion and for his own life (2 Bl. 181 187). If to A. and B. and their heirs, they are joint tenants in fee, (2 Bl. 181); and the inheritance goes entire to the heirs of the Survivor (2 Bl. 184. Litt. §280.

* Would it not be more correct to say that each has an estate in the whole for their joint lives, & the survivor, the entire estate for his own life after the death of his companion? (2 Bl. 183.) The remainder taken in time only of the Survivor.

rest 2.

If a grant is made to A. and B. for their lives, and to the heirs of A, they are joint tenants for their respective lives, and A. has the fee in Reversion. 2 Bl. c. 12 Litt. §285. 2 Woods 124

* joint lives (w. it not so) if A. & B. survive C? - tho' for their respective lives, if B. survives A.

rest 21.

So if a grant is made to two men and the heirs of their bodies; or to two women &c; or to a man and woman who cannot intermarry, as brother and sister, they have a joint estate for life but from necessity, one not in entirety. For, no person can

† and the heirs of their bodies;

in either of the cases, be heir of the body of both.+ 2 Wood. 128. 4. Co. L. 84 a. Litt. § 283). — The issue of each, therefore, will have a moiety after the death of both, & hold as tenants in common. Litt. § 283.) And if either of the donees dies without issue, his moiety reverts‡ to ye donor. ibid. {For, ye inheritance not being joint, there is no survivorship, as to that. Same rule, when an estate is given to one man, & two women, & the heirs of their bodies & vice versa. Co. L. 184 a.

+ In ye two former cases it is physically impossible; in the last, legally so.

‡ (on ye death of ye survivor)

If, to a man and woman, who may intermarry, and the heirs of their bodies; it is a joint estate tail:+ ~~[illegible]~~ The inheritance, therefore, goes entire (if they do not intermarry) to the heirs of the body of the survivor (as in the case of joint tenants in fee, to their heirs gen.) ~~[illegible]~~ Litt. § 283. Co. L. 182 a

+ For they may have a common heir of their two bodies.

Secondly, Unity of title: Their estate must be created by one and the same act; as, the same conveyance, or devise. 2 Bl. 181. [illegible] 2 Prest. 88-9. 1 Ram. 311, 312). Else, they would have different titles ~~[illegible]~~, which would destroy the jointure ab initio. (Ex.) Grant to A. by one deed, & to B. by another.

Thirdly. Unity of time — Their estates must commence at one and the same period: e.g. if an undivided half of an estate is devised to A., to take effect at one time, and the other half to B. at another, they are not joint tenants. — 2 Bl. [illegible] 2 Cru. [illegible] So, if a remainder is limited to the heirs of A. and B., and they die at different times+, their respective heirs are tenants in common. Litt. § 283

+ (as, it is morally certain, they will);

Of Real or Joint Tenancy.

But if two may hold a use as joint tenants, tho' it vest in them at different times &c. Feoffment to A. to the use of himself and his future wife. For the use growing out of the feoffment, has relation to it. (2 Bl. 182. 2 Ly. 340. 1 Co. 101. 13. Co. 56.) And thus both are deemed to commence at ye same time.

Lastly: Unity of possession. — They are seised per my et per tout — Each is seised of the whole of an undivided half of the whole, & not of ye — (2 Bl. 182. Litt. § 288. 5 Co. 10. 2 Wood. 130.

Hence one cannot in strictness enfeoff the other — tho' he may release to him; and a feoffment in form will enure as a release. (1 Bac. 215. 4 Cr. 5. 696. Perk. § 193, 197. 1 Vent. 78

If one each is already seised of every part. post, 24. Title by Deed, 59.

But if a fee is granted to husband and wife, they are not strictly joint tenants, nor tenants in Com. — Being considered as one, they are seised per tout, not per my, & hold by entirety, not by moieties. — (2 Bl. 182.) This is ye effect of their legal unity.

1 Roper Husb & Wife 51. 2

vid. Husb & Wife, 48.

Hence the husband cannot, by his sole act dispose of any part of it — not even a moiety; Nor can the wife. — But the whole must remain to the survivor, unless disposed of by Fine or Recovery, in which both join. (2 Bl. 182. Litt. § 291. 665. 2 Lev. 39. Co. L. 187. 324 b. 4 Co. 140. Perk. § 223. Shep. 205. 1 Rol 388-9. 1 Vern. 120. 3 Bac. 690 — 5 T.R. 654 —

For each is seised of the whole, & neither of any undivided part. So that neither of them alone can be said to hold any part. Neither can dispose of any part, without disposing of ye other's int.

Of estates in Joint Tenancy 8.

Co. L. 351. 1 Bac. 264. Stra. 516. 3 Lev. 65. 3 T. R. 94.

+ Ex. A bond, note, or term for years, bequeathed to them both.

The last rule does not hold as to choses in action and chattels real which are vested jointly in husband and wife.+ Of these he may dispose, at pleasure during coverture ~~sale~~ for valuable consideration. (2 Brodr. 128. (vide Husband and wife, ~~72~~ 72.74.76.) — For this he might do, if they had accrued in her sole right: Of course, he may do it, when they vest in both, jointly. [Of such chattels real he may dispose, I trust, without valuable consid. ~~they being~~ they being assignable at law.]

(Personal chattels given to husb. and wife, in possession, vest absolutely in him. (2 Brodr. 128)

Note, A (~~wife~~) widow is not entitled to dower, in an inheritance, holden jointly by the husb. and another — The other tenant has a higher title. — Qu. Whether husband is, contra, entitled to Curtesy? (2 Brodr. 128. cite ... 2 Bac. 186. ...) — (Post "Survivorship") — In Con. yt. wife has dower, & yt. husbd. curtesy, in such a ca. — nojus accrescendi, here.

Aliter, if yt. h. survive his co-tenant, I conclude. For he then dies seized in severalty.

From this intimate union of interest and possession proceed the principal incidents of joint tenancy; — One of which is that act by or to one+, ~~...~~

+ affecting their joint estate, are consid.d as done, by, or to, both.

E. gr. If both make a verbal lease, reserving rent to one only, it will ensure to both, by reason of the joint possession — So if livery & seisin be made to one, it enures to both — by reason of the privity of estate. (2 Brod. 130. 2 Bl. 182. Co. L. 192.) — Indeed, acts done to, or for, or gen'ly by, one, in relation to yt. joint estate, are, in legal contempl.n, done to, or for, or by, both.

Of Estates in Joint-Tenancy

Livery of seisin to one, is, in legal effect, made to both; for the possession of one, is, in law, the possession of both — So entry by one, is effectual for to both. 2. Bl. 182. Hob. 120. Co. L. 49. 319. 364.

post, 26. — So, in actions relating to their joint estate they must, according to the old rule, sue or be sued, jointly. (2. Bl. 182. 2 Inst. 215. 1 Co. Lit. 180. 195. East 328. + 1 Root, 245. 4 Day, 298. 303. (Not so in Conn.+) ~~[illegible]~~ And now, according to late opinions, this rule is relaxed in Eng. (Post, 26.) 2 East, 391. 5 T. 51. 2 Caines, 159. 6 East. 173. 11 Id. 288.): A several lease, to found an ejectment being held to be a severance of ye jointure.?

One cannot have trespass agt. the other in respect to the joint estate. For each has a right to enter on every part. — (2. Bl. 183. 3. Leon. 262.)

But, regularly, one cannot do any act which will defeat the estate of the other. Ex. Cannot lease the whole, agt. the other's consent (2. Bl. 183. [illegible] Conn. 236.) — ~~[illegible]~~ ~~The~~ It wd. not enable one to virtually divest ye. entire int. of ye. other

post, 13. 26. — One may have an action of waste agt. the other, by construction of the Stat. Westm. 2 (2. Bl. 183. 2 Inst. 403- [illegible]) ~~[illegible]~~ Secus, at Com. Law; ~~[illegible]~~ ye. act being deemed ye. act of both, & for both

post, 26. — One may make the other bailiff of his moiety, and so have account agt. him, for the profits; + but not otherwise by Com. Law. But by Stat. & Conn. one may have account agt. the other, # for receiving pr. more than his

+ of com. right,

as co-tenant,

share of the profits (2 Bl. 83 ... 2. 209 2. Mad. 130.) – tho' not made bailiff, by y^e act of y^e other.

Upon this intimate union of interest and possession, depends, also, the grand incident, viz. that of Survivorship. (2 Bl. 83.

The right of Survivorship (jus accrescendi) is the right of the survivor, among joint-tenants, to the whole remaining interest in the tenancy after the death of his companion. (2 Bl. 83-4 ... Wood 125

So that if A. B. and C. are jointly seised or possessed of an estate, on the death of one, the whole interest vests in the two survivors; and on the death of one of them, the whole goes to the last survivor. Ex. to A. B. and C. in fee, for their lives, or for years. (2 Bl. 83 ... 8. ... 125.

+ held by y^m in joint tenancy,

For the original interest falls in the survivor; i.e. an interest in all, and in every part; and the survivor is not divested of this original int. by the death of his companion. He has in a higher claim to the whole, than any other has to any part. (2 Bl. 18 .) – For y^e succession of another to y^e int. of y^e dec^d tenant, w^d destroy y^e survivor's orig^l seisin in tout. To other c^d hold in joint ten^t w^t him.

Of Estate in Joint tenancy

Hust. A W. No. 1. p. 79. This right of survivorship is paramount to the claims of the creditors of the deceased tenant — even of judgmt. creditors, unless execution be sued out, at his death. (3 Bl. Co. 209. 210. Litt. § 286. Co. L. 184. b

The inchoate right of ye. survivor is necessarily prior to theirs — & of course paramount. +

+ If exn. is sued out agt. decd. tenant, before his death, it attaches a lien on ye. land.

Same rule holds, generally, as to chattels personal, holden in joint tenancy: Secus as to joint stock in trade. As to this there is no survivorship. — It would injure commerce, & the benefit of general. (2 Bl. 399. Litt. § 281. Co. L. 182 a. Wats. on Partnership 69. 1 Ld. Raym. 340. 2 Vern. 293. 1 Eq. Ca. Ab. 290. 11 Co. 3. b. [illegible]

Partners in trade are not, therefore, joint tenants, to all purposes, tho' called such. (Wats. P. 116. 132. 1 Ves. 242. 252. Comp. 447. 814. 2 Atkins. 125.

And for the encouragement of husbandry, the same rule holds as to stock on a farm, owned & occupied jointly. — [illegible] There is no survivorship. (2 Bl. 399. Vern. 217. Co. L. 182.

Neither the King nor any other corporation can be joint-tenant with a private person. — One reason, says Blackstone, is that the private person has no chance of the benefit of survivorship. 2 Bl. 184. Co. L. 190. Finch L. 83. 2 Lev. 12.

— And, ~~[illegible]~~, "the jus accrescendi," he says, "ought to be mutual." ~~[illegible]~~

But this is not the true reason. Swift.

For two Corporations, cannot be joint tenants, tho' the chance of survivorship is equal.- (2. Wood 26 Litt. § 296.

Besides, it is not necessary, that the chance of survivorship should be equal or mutual. For, A. and B. may be joint-tenants for the life of A.- Here B. has no possible chance of survivorship tho' A. has. ~~[illegible]~~ (2. Wood 2, 26. Co. L. 181 a. b.

Municipal Law, p. 31. 10 Co. 30. Hob. 211. 3 T. R. 594. 4 D. & E. 810. 822.

Is not the reason of the rule, then, that the right to hold an estate jointly with another owner, is foreign to the object for which bodies politic are created? It is not necessary to their existence or to the exercise of their powers. 14 Bac. 542. 3 Burr. 3. Mass. 513.

The right of survivorship does not obtain in Conn.t - Root. 48. - ~~Con joint tenancy then, exist in Conn.t strictly speaking~~.

Joint-tenancy may be destroyed, by destroying any of its unities.-

+ which refers to the creation of the est.,

1. Unity of time+, (it being past), cannot, indeed, be destroyed. (2. Bl. 185.)

2. By destroying its unity of possession. E.g. If they part the land, and hold it in severalty. They are not, then, joint tenants, & y.e jus accrescendi is also destroyed (2. Bl. 185. Co. L. 188-193.

~~Decided in Conn. that the Declaration in an action for partition must demand its proportion not in point of quantity, but of value taking quantity and quality together Root. 69. 70.~~

Of Estate in Joint Tenancy

post, 15. 24

By the Com-law one could not compel the other to make partition tho' they might do it by agreement; Being originally created by agreement of all, it could not otherwise be destroyed.

But by Stat. 31 and 32. Hen. 8, either may compell a division by writ of partition. ~~[illegible]~~ (2. Bl. 185. Litt. § 290. 292.

So by Stat. in Conn.* Stat Con. 258-

[~~[illegible]~~] So, guardians are enabled, by our Stat. to make partition of wards' land.+ ~~[illegible]~~ Stat. Con. 258.

~~[illegible]~~

Decided, in Con. that the declar. in an action for partition must demand Pl[ainti]ffs proportion, not in quantity but in value, taking quantity & quality together. (1 Root, 69-70.)

* Our stat. does not extend to town-commons, or sequestered lands.

+ But ye wards, themselves, can, at Com. law, do ye same thing—i. e. make equal partition. (See Parent & child, p.

2. By destroying its unity of title.

If one aliens or conveys his part to a stranger. Here the other and the grantee hold by different titles, tho' unity of possession remains. (2. Bl. 185. Litt. § 292. 1 Wood. 130. Co. Lit. 186. a. Sal. 286. 1. Inst. 44.)

Of course they hold as tenants in com.

But, a devise by one joint tenant does not sever the estate; for it does not take effect. The survivor has a preferable title, accruing at the creation of the estate (2 Bl. 186. ~~[illegible]~~ Litt. § 287. Co. Litt. 185

Est.s in rev.n, 3. 35. — 4. By destroying the unity of interest. Thus, if there are two joint-tenants for life, and the inheritance is purchased by, or descends upon, one of them; it is severed — his life estate being merged. (2 Bl. 186. Co. Lit. 4701)

ante, 3.

+ being created by one & the same conveyance,

Secus if an estate is originally granted to two for life and to the heirs of one of them: for these, + are not separate estates, but branches of one estate (2 Bl. 186. 2 B. 60. Co. Lit. 182.); & therefore, no merger.

5. If a joint ten. in fee makes a lease for life of his share, it destroys the jointure. This a severance of the freehold. (2 Bl. 186. Lit. § 302. 3 B. C. (191 b) — So held, lately, where ye lease is for years. (12 East 39. 57. 11 Id. 288. 6 Id. 173. 2 [illegible]

If one of three joint ten.s aliens his share, the two others hold their parts as before. — As between them there is no severance. So, if one of the three release his part to one of the other two; the jointure, as to the other two parts, remaining — (2 Bl. 86. Litt. § 294. 3 B. —) So yt. ye. releasee holds ye. whole of one undivided third, as in com.; & is a joint-tenant wt. his companion, as to ye. two other thirds. — Survivorship will obtain, as to ye. 2 thirds — not, as to ye. other third.

Whenever the jointure ceases, the jus accrescendi ceases with it. (2 Bl. 86. Co. L. 189

73.

Of Estate, &c.

In general, it is advantageous to sever the joint ture:— For the jus accrescendi being thus taken away each may transmit his part to his representatives. Occurs if two are joint ten.ts for life. (2 Bl. 187. 1 Inst. 55)

If two are joint ten.ts for life, and one aliens, for the life of the other, he forfeits his interest. For since after the severance he could have in his own severed half only an estate for his own life; and his grant for the life of another, is a forfeiture. (2 Bl. 187. 4. Com. 237. Co. L. 252) — as in case of a life-estate in severalty, (see Est.s for Life;

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If one joint ten.t evict his companion, the latter may have ejectment, to obtain possession.— But there must be an actual ouster: sole possession and receipt of the whole by one rents is not sufficient to give the action. (3 Bur. 217. Co. L. 199. 200.) For these alone do not amount to an ouster, (Comp. 217.): And where there is no ouster, y^e poss.^n of one, is deemed y^e poss.^n of both:×

+ And y^e receipt of y^e profits by one, is consid.^d to be for both. — But adverse poss.^n is suff.t ante, 7.

So, one may have an action of waste ag.t his co-tenant.‡ For, as by the com. law, there could be no compulsory partition, the inheritance c.^d not otherwise be protected ag. the wrongful or wanton acts of either. 2 Bl. 185. 2 Inst. 403. — Stat. 15.)

‡ by construc.^n of y^e stat. of Westm.^r 2. (13 Edw. 1).

Of Estates in Coparcenary

VIII – Of Estates in Coparcenary:– An estate in Coparcenary is one which has descended to two or more persons+ – as where, at Com. law, the next heirs of a deceased person are two or more females. Here they all inherit as Co-heirs, & are called Coparceners or Parceners. (2 Bl. 187. Litt. §s. 241. 242. 2 Woodn 113. Co. L. 163.

+ as co-heirs.

So, by the custom of Gavelkind all the sons are Coparceners. – (2 Woodn 122. 2 Bl. 187. Litt. §. 265.

In Conn.t all the children of a person descend as his heirs at law, & inherit, as coparceners. – So, genlly in y. U. S.

All the parceners are considered as but one heir; they having but one & the same estate. (2 Bl. 187. Co. Lit. 163. 2 Wood. 113. 114. 118 –

Their properties are, in some respects like those of joint-tenancy. – Three essential unities – of interest – title, & possession. – (2 Bl. 188.

They must sue and be sued jointly, in cases relating to their estate*; and the entry of one is, in general, the entry of all. (2 Bl. 188. Co. L. 164. 188. 2 34. 2 Woodn 114. 118.
So an entry by the guardian of one infant-parcener, enures to the others. (4. T. R. 386. Co. L. 243.
2 Bl. 88. 209. 228.

post, 26.
1 Ch. Pl. 53.
* But vid. ante, 7. & post, 26.

of estates in coparcenary

One cannot have trespass agt. the other; (ante, 13.) nor can one, like a joint-tenant, maintain an action of waste agt. the other: For one parcener could always prevent waste, by compelling partition; which, at com. law, (till Stat. 31 & 32 Hen. 8) joint-tenants could not do. (2 Bl. C. 185. 188. 2 Inst. 403. 2 Wood. 119. 120. Co. L. 174. a.)

ante, 11.

They differ materially from joint-tenants in these points:—

1. They always hold by descent; joint-tenants, by purchase. Hence no other than estates of inheritance, can be holden in Coparcenary. (2 Bl. 188. Litt. § 254. 2 Wood. 115. 116.): And in general whatever may be inherited may be so holden. (2 Wood. 116. Co. L. 164. b. 165. a.)

2. No unity of time necessary. E. If one of two parceners dies, the survivor and the heir of the deceased are parceners; tho' their estates vest at different times. (2 Bl. 188. Co. L. 174. 154. 2 Wood. 114. 115.)

3. Tho' they have a unity, they have no entirety of interest. Each (there being two) is seised of the whole of an + undivided moiety, not of a moiety of the whole. Hence no "jus accrescendi." The share of each descends to her (or his) heirs. (2 Bl. 188. Co. L. 163. 164.

+ undivided

Of Estates in Coparcenary

The mode of Descent among parceners is per capita, if the heirs (claimants) are all related in equal degree to the Com. Ancestor, and are entitled in their own right. E.g. the Ancestor leaves 2 Daughters or 2 Sisters (2 Wood. 115. Co. L. 164. a.b.) — Each takes a moity.

Secus, if they are not in equal degree related, or, are entitled by right of representation: They then take per stirpes. E.g. the Ancestor had two Daughters, one of whom dies, leaving issue, 4 daughters, living the ancestor. — The issue of ye decd daughter take per stirpes.* So, if the heirs are all grand-children, the issue of two Daughters ++ (2 Wood. 114. 115. Co. L. 164. a.b.) In Descents from Coparceners, males are at com. law preferred to females, as in other cases of Descent. (2 Wood. 115.)

* i.e. the share wh. their mother, if alive, wd have taken.

++ The issue of each, whether one or more, will take her share. For tho in equal degree, they are entitled only by right of representation.

As long as an est. in copary continues in a course of descent, (the poss. not being disunited), it is holden in Coparcenary.+ Secus, if the possession is severed by partition.‡ So if one alienes her share, tho no partition; for the title is disunited, [illegible] (2 Bl. 188-9. 191 Litt. § 309 2 Wood. 118. 119.) Ex. One of two parceners alienes his share to J.S. — now ye other, & J.S. hold, not as parceners, but as ten. in com.: And ye est. descends to their respective heirs, in com.

+ 2 parceners die, leaving ye land to descend to their heirs (undivided): The heirs are parceners.

‡ In ye ca. ye heirs of ye two, hold in severalty — as ye orig. parceners, themselves, did, after partition.

Of Estates in Coparcenary

So, it is said, if one disseises the other, the Coparcenary is at an end; for the possession is severed. (2. Wood. 118. 119. ~~Qu. vide ante, 13.~~ [Is the tenancy any more destroyed than in the case of joint tenancy? Qu. see ante, 13.]

So if two parceners marry and die, leaving husbands, entitled to Curtesy, the husbands do not hold as parceners, but as tenants in Com. For they do not claim by descent. (2 Wood. 119. Co. Lit. 164. b); & ~~..~~ their estates are not of inheritance.

As husband may have curtesy in an estate holden by the wife, in Coparcenary: so the wife may have dower (semb.) in lands so holden by the husband. (2. Wood. 119. Litt. § 264) there is no survivorship to prevent it.

Partition may be made among parceners by consent, in either of 4 different ways: 1. Where they agree, and the division and the part that each shall have. 2. When they choose a third person to make the division. 3. Where the eldest divides, and the other choose first. 4. Where they each cast lots for their shares (2 Bl. 189. 2 Wood. 120. Lit. § 243. 264. Co. Lit. 166. 3. Co. 22)

They are also compellable to make partition at Com. law (2 Bl. 189. Litt. § 241.)+

+ For as y^e est^e is created, without any mutual agr^t or consent, of y^e parceners; it is reasonable y^t it should be capable of being destroyed, without such mutual agr^t.

Compulsory partition is by writ of partition, at Com. law, or by bill in Chancery. (2 Wood^s. 110. 1 Fonbl. 15-19. Co. L. 171. 169. b. n. 2.

On a writ of partition there are two judgments: the former is, that partition be made; on which a writ issues, to the sheriff, to cause partition to be made, by a jury: On the return of the jury's inquisition, or verdict, the second judgment is given, viz^t that the partition so made be ratified, and forever confirmed (2 Wood^s. 125. & Bl. 189.

And the judgm^t binds infants, as well as adults. (1 Fonbl. 15. Co. L. 169. b. n. 2.) – [See Parent & Child.

– Individual parceners can themselves make equal partition, 3 Burr. 1803 (or 1805).

The com. practice formerly was to apply to Chancery for a decree to make partition; and it is now the practice where the title is complicated, or there is any incumbrance. (2 Wood^s. 110 & 7 Ves. & 62. 1 Fonbl. 15-19. Co. L. 171. 169. a. n. 2.

When an indivisible thing is holden in Coparcenary, the com. practice, is for the eldest sister, (to have it, if she pleases) making the others a reasonable compensation in other parts of the inheritance; or they all have the profits or use of it, by turns. (2 Bl. 190. Co. L. 165. a.

Ex. A mill.

Of Estates in Common

IV. of Estates in Common.

Tenancy in Com. (according to Blackstone) are those, who hold by several and distinct titles, but by unity of possession. 2 Bl. 191.

By this must be understood, only, that as to other unity than that of possession, is (in strictness) necessary to constitute a tenancy in Com.: for they may hold the same quantity of int.t vesting at the same time and under the same title or conveyance, if the proper terms are used to create a tenancy in Com. (2 Bl. 191. Litt. §§ 292, 293. 2 Prest. Abst. 33. 4. Co. 2. 86. a. 3 Bac. Abr. 188. 194.

note, 2.

+ yet estates primâ facie, a joint tenancy—i.e.

(But if the interests and title be the same, and do commence at the same time, and the possession is united in the owners) they will be joint-tenants, unless there are express words to create a tenancy in Com. (2 Prest. Abst. 34.) — Exps. 1. "To A. & B. & their heirs" — they are joint tenants in fee. — 2. "To A. & B. & their heirs, to hold as tenants in common" &c. — or, "to hold one half to A." &c. — they are tenants in Com.

And if there is no other unity than that of possession, they are [illegible] tenants in Perth. (2 Bl. 191.

Of Estate in Common

Coke defines tenants in Com. to be those, who hold land "by several titles, or, by one title, and by several rights;"+ (Co. L. 189 a. 2 Mod. p. 133. 2 Bac. 158. 192) And this, tho' not a complete definition, is correct, as far as it extends.

+i.e. by distinct rights, or ints., & not by joint right.

Would it not be correct to say, that they hold, by several rights, (or interests), but by an undivided possession?

Hence one may hold in fee, and the other in tail, or for life; for, no unity of interest is necessary.

One, by purchase from A. the other by purchase from B.; or, one by purchase, the other by descent; for, no necessity of unity of title.

The estate of one may vest at one time, & that of the other at another: for, no necessary unity of time. (2 Bl. 192) The only necessary unity, then, is that of possession; [illegible] so that neither can know, which part is his. (2 Bla. 192) Thus, if an estᵉ is granted, by one deed, to A. & B. in fee, or for life, to hold, "as tenants in com., & not as joint-tenants;" they are tenᵗˢ in com.: Yet, here is unity of title, time & possⁿ. – but no joint interest; so that they cannot be joint-tenants.

Tenancy in Com. may be created either by such a destruction of an estate in joint-tenʸ or copar.ʸ, as does not sever the possession; or, by special limitation, in a deed or devise, &c. (2 Bl. 192)

E.g. If one of two joint tenants, aliens his share to J. S. – J. S. and the other joint-tenᵗ.+ are tenants in Com.; for they have several titles.

+commencing at diff.ᵗ times.

So, if one aliens to A., the other to B., the grantees are tenants in Com. for same reason.
(2 Bl. 192. Litt. § 293. 2 [illegible] 2 Mod. 133. Co. L. 189 [illegible])

So if one of two parceners conveys her part to J.S.; he and the other parcener are tenants in Com. causâ quâ supra. (2 Bl. 192. Litt. §. 309 3 Bac. 191). And also, because J.S. is not in by descent.

ante, 3. So if an estate is granted to two men or to two women and the heirs of their bodies; tho' for life they are joint-tenants; yet they have distinct inheritances. But as the possession is undivided their issues shall be tenants in Com. (2 Bl. 192. Litt. §. 283.) For their titles are different: One holds, as heir of A. the other, as heir of B.

Indeed whenever a joint tenancy or coparcenary is destroyed, without a partition, so, that unity of possession remains, it is converted into a tenancy in com. com.
(2 Bl. 193. 3. Bac 194

ante, 2. 2. It may be created by express limitation in a deed or devise (2 Bl. 193. 2 Wood. 134 3. Bac 194-5.) But care is necessary not to use words, creating a joint-tenancy.

And if, by deed or devise there is limited (granted or given) to two or more, an undivided estate, which is not a joint tenancy: it must be a tenancy in Com. It cannot be in Coparcenary; being created by purchase. (2 Bl. 193. 1st [illegible]

ante 2. The rules of legal construction favor joint tenancy, rather than tenancy in Com. for by the latter the feudal services arising from tenure are divided. (2 Bl. 193. ~~[illegible]~~)

The most usual and safest way, when a tenancy in Com. is intended to be created by deed or devise, is to limit the estate to A. and B. expressly, "to hold as tenants in Com. and not as joint tenants." (2 Bl. 193. 3 Bac. 185.)

ante 2. But other modes of expression will answer the same purpose: Ex. A grant to A. and B. to be holden, one half to A. the other to B. for joint tenants do not take by distinct moieties; and here a severalty of interest is plainly expressed. (2 Bl. 193. Litt. § 298. Co. L. 190.a. 3 Bac. 186.

Of Estates in Common

So if one grant an undivided half of his land to J. S.; he and J. S. are tenants in Common. For they have different titles, accruing at different times. (2. Bl. 192. Litt. §292. Co. L. 190 3. Bac. 194.

A deed or devise of lands to two, to hold "jointly and severally," creates a joint tenancy. For a joint estate is implied in the word "jointly"; and "severally" imports perhaps only a power of partition. (2. Bl. 193. 1 Ch. C. 52) And of construction favours joint-tenancy (ante, 22.

But An estate devised to two or more "to be equally divided between them," is an estate in Com.+ (2. Bl. 193. 3 Co. 39. 1 Ventr. 32. 3. Bac. 95. 2 Rol. 90. 2. Vern. 323. 355. 366. So to A. and B. "equally," (Cro. J. 654 2 Vez. 694. 2. Vez. 212. 1 Eq. Ca. ab. 292. pl. 11

+ for the intent is plain, that they are to hold by moieties only.

And it has been formerly holden, that these words, in both the above cases in a deed, create a joint tenancy. (3. Bac. 123. 2. Bl. 193. 1 Eq. C. ab. 292. 1 P. W. 17 Sal. 392. 2 Com. 622. Gilb. Ten. 88.

However in a modern case such words, in a deed have been holden to create a tenancy in Com. (3. Mod. 135. Salk. 34. Cowp. 660.

Of Estates in Common

Tenancy in Com. may subsist in estates of freehold, chattels real and chattels personal. (2. Wood. 35. Litt. § 320.

Wife of a ten.t in Com. of an inheritance, is entitled to dower — and, (semb.) the husband to Curtesy, where the wife is ten.t in Com. (1. Wood. 135 Litt. § 45.): there being no jus accrescendi.

ante, 5.

As tenants in Com. have distinct interests or rights; one may directly convey his share to the other; which a joint ten.t cannot do, tho' he may release. 2. Wood. 135-6.

As to its incidents: Ten.ts in com. are not compellable, at Com. law to make partition; tho' by stat. 31. and 32. H. 8. they are. 2 Bl. 194. (2 Wood. 35. — at com. law yr consent of all is necessy. — as in joint teny. (see p. 11.

No survivorship between them; for they take by distinct moieties. (2 Bl. 194) — ~~i.e.~~ in point of interest, ~~[illegible]~~ & are seised, only per mie.

Of Estates in Common

~~according to former opinions,~~ They can not join in actions relating to the realty; for their titles and interests are several (2. Bl. 194. Lit. §. 311. 2. Mod. 135. 3. Bac. 216–217. Co. L. 197.a Sal. 390. Carth. 240. 1. Raym. 422. 2. H. Bl. 387) – ~~See post 20.~~ ~~But is not y.e rule now exploded~~ [altered]? (see ~~next page~~) But see p. 25.

Yet if an indivisible thing (as a horse holden in Comm.) is to be sued for, all ought to join. (2. Bac. 216. Co. L. 197 b. 2 H. Bl. 94.) – The right of action in y.e ca. survives to y.e survivor ~~[illegible]~~.

So in trespass, and all other personal actions, founded on their interest in Com. they ought to join: For tho' their estates are several; yet the damages to be recovered ~~in~~ ~~personal actions~~ are not so. Besides, it would be impolitic to permit several actions for one trespass. (2. Bac. 216. Litt. §. 315. 2. H. Bl. 387 a) — Indeed, these actions survive to the survivor. (Co. L. 198.a [illegible] and 2 Salk. [illegible]); [illegible] furnishing an additional reason, for y.e joinder of all. ~~Is not y.e y.e principal reason of y.e rule?~~

• If they make a lease, reserving rent, the Reservation will ~~shall~~ follow the nature of the Reversion, which is Several. — Ergo, they cannot + join, in an action for rent arrear. (2. Bac. 216. [illegible] 1. Co. L. 197.a [illegible] 212.)

+ their titles to it being several. – Yet may they not join under y.e modern rule? next. [illegible].

1 Ch Pl. 50-3. ~~so that they cannot make a joint demise.~~ + Or rather, they have no joint int.

If they are disseised they cannot ~~it is said~~ join, in an action to recover their land. For their titles are ~~[illegible]~~ distinct. + (3 Bac 210. 1 Show. 342. 2 Vent. 214. Comb. 230. Carth. 224. Stra. 820. Ld. R. 3.2. 341.) [Such, at any rate, has been ye rule heretofore. (Qu. Is not this still allowed to be ye rule? (see 12 East, 39. 57, 61.)]

Indeed, for the same reason they cannot make a joint demise to found an ejectment. Their lessee under a joint lease from them, cannot recover. 3 Lev. 216. 1 Show. 342. Co. Litt. 200. 2 Wils. 232. 2 [illegible] 384. [illegible] 448. [illegible]

Demise of Coparceners as well as joint tenants. (See [illegible] 726. 2 Sch. 700. Str. 1181. 1 Wils. [illegible]) — Their titles & interest are the same. ante, 4.)

ante, 7. 14. Pleading, 13. 45. at their election, Qu. as to these distinctions. For according to some late authorities joint tenants & coparceners ~~[illegible]~~ may either join, or sever, in ejectment. 12 East, 39. 57. 61. 2 Caines, 169. 1 Cown. R. 354. 6 East, 173. 11 Jo. 288. — 1 Root, 246. 4 Day, 298. — Qu. as to tenants in com. (12 East, 61) i.e. can they join?

+ So of joint ten. & coparceners. ante, 7. One tenant in com. ~~[illegible]~~ join ~~or sever~~ in actions ~~[illegible]~~ relative to the realty. + ~~[illegible]~~ [Being, as to the privity of estate. The title of one may be good & that of the other bad. In any case, they have no joint title.]

ante, 7. One [illegible] tenant in com. cannot sue his co-tenant in account, for receiving more than his share of the profits of the estate, + except where the latter is made Bailiff to the former, as in case of joint tenants. (ante). ~~[illegible] Stat.~~

- For quondy: profits, ~~[illegible]~~ receipt of them, by one, is consid. as a receipt by both: The possn. being joint. Co. Litt. 199. 200.] But by stat. 4 Ann the action lies between them, as more tenants in com.

ante, 7. So by Stat. [illegible] one tenant [illegible] may have action of [illegible] ag. the other. (2 Bl. [illegible] 183.

Of Estates in Common

See Ejectmt. 57. If one ten. in com. ousts or expels the other, the latter may have ejectment to regain possession (3. Burr. 2[illegible]. Co. Lit. 199.b 200.a ~~[illegible]~~ — Salk. 568. 2. Bl. 194. 3. Wil. 118)

ante, 13. Same rule as to joint-tenants.

But there must be an actual ouster — otherwise the possession of one is the possession of both (Hob. 120) — Sole possession and receipt of the whole profits are not in themselves sufficient (8 Bac. [illegible] Salk. 392. 4. Mod. 29. Ld. Raym. 404. 434. 453. 460. 416. 8. Mod. 49. Com. R. 113. Stra. 531. 160. 185. 1. East. 568. — ante, 13.

As to what amounts to sufficient evidence of actual ouster:—
There need not be an actual forcible ouster proved — For tho' sole possession by one as ten. in com. can never amount to evidence of actual ouster, yet sole and adverse poss. by one, is sufficient.
E.g. Possession by one only, who denies the other's title. (Co. Litt. 243.b 373.b Cowp. 217. [illegible])
Here the jury may presume actual ouster —
So, great length of sole and quiet possn. (as 36. years) by one, (no acct. being demanded by the other), is sufficient evidence to a jury, that it has been adverse — (Cowp. 217. 3. Burr. 1895. — Ld. Raym. 327. 12. Mod. 658. Ejectmt. 28.)
And in such cases yt. stat. of limit. may run between them — ± 5.31.

…under y^e. com… rule,

But
Suspicion by cest. in ejectment of lease entry and ouster, is sufficient (3 Bac. … 189) so that the case … to prevent a nonsuit … to the jury (… Bull. … 3 Bac. 219. 3 Burr. 1895.
But still, y^e. ouster may be contested, … in w^e

…jectment, …

After such recovery in ejectment the tenant … may have trespass for mesne profits. For this is incident to the recovery — and is virtually only an action of account.
(… 118.)

…jectment, 27.)

(≠ from p. 27. 30.)
The Stat. of Limitations does nothing ag^t. a tent. in … out of possession, where his possession … Lord Kenyon, … after … actual ouster (…) … if … no ouster, the possession is not adverse, and … the possession … of … both. (… 217.)
So, of joint-ten^ts & coparceners.

1 How far the ten^t. out of poss^n may elect to consider himself ousted, or not, see 1 Burr. 111. 117. … Car. 383.

Of Estates in Common —

Of judicial
These remedies between tenants in Com.
extend only to tenancies in Com. of things
real. For savoring of the realty.— 1
(Litt. s. 323. 322.) [struck-through text]
as estates in lands &c.

If a chattel personal is owned in com.,
& one takes the sole possn. the other's
only remedy is by reseising it when he can.—
Litt. s. 323. 3 Bl. Com. 219. Co. Lit. 200 a.
End of joint ten. &c.—

Tenancy in Com. may be destroyed
1. By partition:— 2. By uniting all
the titles and interests in one tenant, by
purchase, or otherwise. It is, then, an estate
~~[struck-through]~~ in severalty — (2 Bl. 194)

If one of two joint tents. coparceners, or tents.
in com. who are disseised, is under a disability,
does ye Stat. of limitns. run agt. the other?
(1 Lo R. 313. 3 Cruise, 555. 14 Vin. 511. 2 Bl. R. 690. 5
Bur. 2604. 6 Mod. 44.) — R. in Com. in ye ca. of tents.
in com. & coparceners, it does not run: As those, under
no disability might, at any time, have recovd. possn. for
themselves, by action. 4 Day, 255. 465. 310.)— The same
reason must exist here, in ca. of joint tenants.‡

‡ sed qu. as to joint tents. & parceners, as their title is of the same, i.e. joint.

~~Of title to things real in general 2 Bl. 195.~~
~~1st by Descent 2 Bl. 201.~~

Finished 10. May. 1812

But qre. as to y^e ca.^s in 4 Leon, so far, as regards joint ten.^ts & co-parceners, for their title is joint. And in y^e ca. of joint ten.^ts, especially, if those ca.^s are correct, y^e party under a disability, wd. be ousted of his chance of survivorship at com. law by y^e disseisin — y^e tortious act of a stranger.

— If y^e qu. depended upon unity of poss.^n, or y^e circumstance of it, y^e rule wd. be y^e same in ca. of joint tenancy, as of tenancy in com: But in 4 Leon, 310, it is adm.^d by y^e C.^t, y^t. y^e rights of a&c, holding in joint tenancy, are sev.^d, by the disability of one — but not so, in tenancy in com. Unity of ~~title~~ interest, therefore, or y^e want of it, must occasion y^e diff.^ce in y^e two ca.^s